No. 95-930

Supreme Court, U.S.
FILED
JAN 12 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

RADOSLAV MARIC, M.D.,

Petitioner,

vs.

ST. AGNES HOSPITAL CORP.; ROBERT J. STACKPOLE; ROBERT J. STANLEY; VINCENT DU VIGNEAUD, JR., M.D.; VINCENT NICOLAIS, M.D.; JOEL GREENSPAN, M.D.; MICHAEL W. PANIO, M.D.; DONALD N. COHEN, M.D.; VITO MARRERRO, M.D.; BARNEY D. NEWMAN, M.D.; ADRIENNE WEISS-HARRISON, M.D.; ELLIOT MOSHMAN, M.D.; GERALD CAMPANA, M.D.; WILLIAM ZAROWITZ, M.D.; VIRGINIA PELLIGRINO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS NEWMAN, WEISS-HARRISON, MOSHMAN, CAMPANA, AND ZAROWITZ

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On the Brief

QUESTIONS PRESENTED

1. Should this Court review petitioner's contention that summary judgment should not have been granted because he did not have an opportunity to conduct discovery, where petitioner did not submit an affidavit pursuant to Fed. R. Civ. P. 56(f) to the District Court, and he did not press the discovery issue before the Court of Appeals?

2. Should the petition be granted in order to review whether the alleged group boycott by the defendants constituted an unreasonable restraint of trade per se, where the issue was not passed upon by the Court of Appeals?

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6 (Part 2) Moore's Federal Practice, ¶ 56.24 8

COUNTERSTATEMENT OF THE CASE

1. Factual Background

The relevant background of the case is set forth in detail by the Court of Appeals. (*See* pages 3a to 7a of the appendix to the petition).

We add, in response to Dr. Maric's contention that a diagnosis of the ectopic pregnancy was made impossible by Mrs. Cherry's cocaine use (p. 4), that he took a different position in the affidavit he submitted to the District Court in opposition to summary judgment. There, he acknowledged that the ectopic pregnancy could have been detected by ultrasound; and, he was criticized by several entities for failing to order such a test (J53-J54, J136, J138, J156, J250 (reference is to joint appendix submitted to the Court of Appeals)).

We also add that before this action was commenced, petitioner sought review of the limitations placed on his hospital privileges from the New York Public Health Council (PHC). (J162, J281-J286).

> Under New York Law, a hospital may terminate a physician's privileges only "for reasons limited to patient welfare, institutional objectives and character or competency of the physician", *Fried v. Straussman*, 41 N.Y.2d 376, 377, 393 N.Y.S.2d 334, 335, 361 N.E.2d 984, 985 (1977). A physician who wants his privileges restored must file a complaint with the New York Public Health Council ('PHC') prior to seeking redress in the courts. See *Guibor v. Manhattan Eye, Ear and Throat Hosp., Inc.*, 46 N.Y.2d 736, 413 N.Y.S. 2d 638, 386

> N.E.2d 247 (1978). A primary function of the PHC is to determine whether there is a medical justification for the withdrawal of the doctor's privileges. Thus, a court must dismiss any suit brought by a physician seeking reinstatement of his privileges if the physician has not exhausted his remedies before the PHC.
>
> * * *
>
> The PHC's mission is to "consider any matter relating to the preservation and improvement of public health". N.Y.Pub.Health L. 225. The PHC customarily passes on cases where a doctor complains that a hospital unfairly terminated his privileges. In disposing of these cases, the PHC draws upon the vast medical knowledge of its members.

Johnson v. Nyack Hospital, 964 F.2d 116, 120-121 (2nd Cir. 1992). The PHC found no cause to credit petitioner's complaint. (J17, J162).

2. Proceedings Below

On March 4, 1994, defendants Barney D. Newman, M.D., Adrienne Weiss-Harrison, M.D., Eliot Moshman, M.D., Gerald Campana, M.D., and William Zarowitz, M.D., at one time all salaried employees of Northeast Permanente Medical Group, P.C. (hereinafter NPMG defendants), moved for an order, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting summary judgment dismissing the action against them on the merits, or, alternatively, for an order pursuant to Rule 12(b)(6) dismissing the action for failure to state a cause of

action. (J20-J21). The grounds for the relief requested included that they had not engaged in an illegal conspiracy.

On March 4, 1994 the codefendants (hereinafter St. Agnes defendants) moved for an order dismissing the action pursuant to Fed. R. Civ. P. 12(b)(6). (J88-J89).

Plaintiff submitted only a memorandum of law in the opposition to the two motions. (J4, J107-J122).

The motions were argued before Charles L. Brieant, United States District Judge, on March 25, 1994. Judge Brieant converted the St. Agnes defendants' motion to dismiss to a motion for summary judgment, and gave the plaintiff and the St. Agnes defendants until April 29, 1994 to file additional papers. (J5). Both submitted affidavits on April 29th. (J123-J309).

On May 11, 1994 Judge Brieant granted the defendants summary judgment dismissing the federal claims. The pendent state claims were dismissed without prejudice. (12a-19a).

On September 13, 1995, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court. (1a-11a).

SUMMARY OF ARGUMENT

1. In moving for summary judgment, defendants presented compelling evidence that petitioner's hospital privileges were restricted because of bona fide health care concerns. Petitioner opposed the motion, arguing that the defendants' actions were a pretext to limit competition. Petitioner did not ask the District Court, through submission of an affidavit pursuant to Fed. R. Civ. P. 56(f), to defer determination of the motion until after he had conducted discovery. Likewise, at the Court of Appeals

petitioner did not seek reversal on the ground that the District Court should have deferred determination of the motion until after discovery.

Petitioner failed to preserve for review the issue of whether discovery should have been allowed before summary judgment was granted; and, petitioner's case does not warrant deviating from the general rule barring consideration of an issue not pressed or passed upon below.

2. The Court of Appeals affirmed summary judgment solely on the grounds that "no conspiracy has been shown" (8a). The second issue raised by petitioner, whether the alleged group boycott of the defendants constituted an unreasonable restraint of trade, was only passed upon by the District Court. No compelling reason exists to review the holding of the District Court, which is not in conflict with appellate precedent.

REASONS FOR DENYING THE WRIT

I.

REVIEW SHOULD BE DENIED BECAUSE PETITIONER DID NOT RAISE BELOW THAT HE NEEDED DISCOVERY IN ORDER TO PRESENT FACTS ESSENTIAL TO JUSTIFY OPPOSITION TO SUMMARY JUDGMENT.

In order to establish a violation of Section 1 of the Sherman Act, "plaintiff's evidence must prove the actors had an intent to adhere to an agreement that was designed to achieve an unlawful objective, . . ." *Capital Imaging v. Mohawk Valley Medical Assoc.*, 996 F.2d 537, 545 (2nd Cir.), *cert. denied*, 114 S. Ct. 388 (1993). Dr. Maric alleges that an illegal agreement underlied the St. Agnes Hospital peer review proceedings that ultimately

resulted in the limitation of his hospital privileges. He contends that those proceedings did not have a bona fide relationship to patient welfare or his competence, but were a subterfuge for hampering his ability to open a birthing center that would compete with St. Agnes Hospital and some of the other defendants for deliveries.

The peer view process serves the important proconsumer function of improving the quality of health care. While there is a risk that the process may be exploited for the private financial gain of the established medical staff, legitimate peer review would be severely chilled if the affected physician was too easily allowed to wield the heavy hammer of antitrust law in retaliation for adverse peer review determination. *See Capital Imaging*, 996 F.2d at 539. As such, summary judgment remains a vital procedural tool to weed out unmeritorious antitrust actions. *See Capital Imaging v. Mohawk Valley Medical Assoc.*, 996 F.2d at 541, *supra*.

To survive a motion for summary judgment, an aggrieved physician is required, among other things, to present evidence that tends to exclude the possibility that the hospital's actions were the result of legitimate health care concerns. *See Matsushita Elect. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *cf. Johnson v. Nyack Hosp.*, 964 F.2d 116, 121, *supra* (termination of surgical privileges for proper medical reasons dispositive of antitrust action).

In moving for summary judgment, the defendants presented compelling evidence that they did not use the peer review process as a pretext for anticompetitive designs.

First, various committees and departments of St. Agnes Hospital were sharply critical of petitioner's handling of the Cherry case *before* April, 1990, the month when petitioner

charges that the conspiracy arose following his announcement to defendants Stanley and du Vigneaud of his decision to purchase a private medical practice. (Appellant's Court of Appeals' brief, pp. 5, 6; J10, J128).

Second, negative evaluations of the management of Lori Cherry's care were not confined to petitioner. Some of the hospital's own procedures were found to be deficient, and were changed. (J155). Furthermore, Dr. Moshman's actions did not escape criticism, and he received the same treatment from the Board of Trustees for the Cherry case as did Dr. Maric, including the monitoring of his cases for six months. (J247-J248).

Third, an independent entity, the New York State Department of Health, corroborated much of the hospital's investigation. Among other things, it noted that the cause of death was a ruptured ectopic pregnancy, and it was critical of the failure of the obstetrician to remain with the patient. (J54).

Fourth, the hospital's actions were based on extensive reviews of the medical care at issue.

Fifth, the New York Public Health Council found that there was no cause to credit petitioner's complaint that his privileges were wrongly restricted.

In opposing summary judgment, petitioner did not file an affidavit pursuant to Fed. R. Civ. P. 56(f), which provides:

> WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the

> application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Such an affidavit must explain "(1) what facts are sought and how they are to be obtained; (2) how those facts are reasonably expected to create a genuine issue of material fact; (3) what effort the affiant has made to obtain them; and (4) why the affiant was unsuccessful in those efforts." *Hudson River Sloop Clearwater v. Dept. of Navy,* 891 F.2d 414, 422 (2nd Cir. 1989).

In the brief petitioner submitted to the Court of Appeals, he did not contend that the District Court should have allowed him to conduct discovery before passing on defendants' motions for summary judgment. Rather, he argued that the papers he submitted to the District Court were sufficient to defeat the motion.

In the opposing brief submitted to the Court of Appeals on behalf of the NPMG defendants, we noted that:

> Finally, plaintiff's affidavit in opposition to summary judgment did not assert that he could not present by affidavit facts essential to justify his opposition, and needed discovery to be had in order to do so. FRCP 56(f); *Hudson River Sloop Clearwater v. Dept. of Navy,* 891 F2d 414, 422 (2d Cir 1989) * * * In addition, on appeal the plaintiff does not assert that the court below erred in failing to give him a continuance.

(Page 39). Petitioner's reply brief in the Court of Appeals did not

contest the above assertion, nor did it request an opportunity for discovery.

Ordinarily, this Court "will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, 99, footnote 5. Only in exceptional cases will questions not pressed or passed upon below be reviewed. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

This is not an exceptional case for reviewing an issue not raised or passed upon below. The Second Circuit characterized the merits of the antitrust claim as "baseless" (7a), and a request for further discovery in order to oppose summary judgment cannot, in general, be raised for the first time on appeal. 6 (Part 2) Moore's Federal Practice, ¶ 56.24, at 56-820 to 56-821.

II.

REVIEW SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DID NOT PASS UPON WHETHER THE ALLEGED GROUP BOYCOTT CONSTITUTED AN UNREASONABLE RESTRAINT OF TRADE PER SE.

Petitioner is incorrect when he asserts that the Court of Appeals affirmed the finding of the District Court that he failed to show an adverse effect on competition as a whole. The Court of Appeals affirmed the judgment below solely on the ground that "no conspiracy has been shown." (8a).

An allegedly erroneous District Court decision is not ordinarily a basis for granting a writ of certiorari. S. Ct. R. 10.1. Furthermore, the District Court granted summary judgment on more than one ground, and petitioner does not seek review of all of them. Lastly, the District Court's determination was not in

conflict with decisions of this Court or Courts of Appeals. (*See* pages 25 to 27 of the brief of the St. Agnes defendants before the Court of Appeals).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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